

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

DESMOND RAY BONNER, #1903762 §
 §
 §
VS. § CIVIL ACTION NO. V-15-046
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WILLIAM STEPHENS, §
Director, Texas Department of Criminal §
Justice, Correctional Institutions Division §

REPORT AND RECOMMENDATION

After preliminary review under Rule 4 of the applicable rules it appears that the petition for a writ of habeas corpus of Desmond Ray Bonner is time-barred. Bonner pleaded guilty to a controlled substance offense on December 18, 2013. Bonner did not appeal and his conviction became final on January 17, 2014, when the time to seek direct review expired. Bonner filed a state habeas petition on July 28, 2014, which was denied on August 6, 2014. On November 21, 2014, Bonner signed his federal petition and placed it in the prison mail system. At that time only 296 days of the limitation period had expired. Unfortunately, Bonner mailed his petition to the district clerk of Victoria County, Texas. According to Bonner the petition was returned to him unfiled on May 1, 2015. On June 11, 2015, Bonner mailed his petition to this court.

The limitations period expired on January 29, 2015, so Bonner's petition was untimely unless equitable tolling of the deadline were appropriate. The Fifth Circuit however has held that erroneously sending a Section 2255 motion to a state court rather

than the federal district court was not sufficient to justify equitable tolling of the filing deadline. United States v. Kirkham, 367 F.Appx. 539, 543, 2010 WL 667439 at **4 (C.A. 5 (Tex.)). This court finds that the Kirkham decision would also apply to a Section 2254 petition.

It is, therefore, the recommendation of this court that Bonner's petition for a writ of habeas corpus be dismissed as time-barred.

The clerk shall send a copy of this report and recommendation to Bonner who shall have until Friday, October 2, 2015, to file any written objections pursuant to 28 U.S.C. §636(b)(1)(c). Failure to file written objections within the prescribed time shall bar Bonner from attacking on appeal the factual findings and legal conclusions accepted by the district judge, except upon grounds of plain error.

Done at Galveston, Texas, this 3rd day of September, 2015.



John R. Froeschner
United States Magistrate Judge